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NO. 445.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

UNITED STATES OF AMERICA, *Petitioner,*

v.

STANLEY J. PATRYAS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR STANLEY J. PATRYAS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR STANLEY J. PATRYAS.

OPINIONS BELOW.

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 57-60) is reported in 90 F. (2d) 715.

QUESTION PRESENTED.

Whether the judgment of the Circuit Court of Appeals was correct in holding that the facts in this case and the

applicable law, including the incontestable clause[1] estops the government from challenging the legality of this judgment.

STATEMENT.

On January 31, 1918 (R. 19-20) this insured was granted a $10,000 yearly renewable term war risk insurance contract which lapsed for nonpayment of premium due August 31, 1919. On June 28, 1927, he reinstated the full amount of this insurance and converted it into a Five-Year Renewable Term Policy of United States Government Life Insurance upon which premiums were paid to and including May, 1932. Claim for benefits of insurance under this converted insurance contract was filed with the Government on January 6, 1931, which claim was denied on November 21, 1931 (R. 10).

In the second count of the amended petition filed in this case upon which trial was had (R. 20) in suit instituted against the United States in the District Court of the United States for the Northern District of Illinois, Eastern Division, pursuant to the provisions of Section 19, World War Veterans' Act, 1924, as amended[2] recovery was asked under

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[1] The World War Veterans' Act, as amended, July 3, 1930, provided: "Sec. 24. That section 307 of the World War Veterans' Act, 1924, as amended (section 518, title 38, United States Code), be hereby amended to read as follows:

'Sec. 307. All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be *incontestable* from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 23: * * * *Provided further,* That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance'." (Italics supplied)

[2] Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930, provides: "Sec. 19. In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons

respondent's United States Government Life Insurance Contract, because of total and permanent disability occurring according to said petition, after reciting the issuance of said contract (R. 14)—

> "afterwards and prior to, to wit, January 26, 1931."

To this petition, petitioner pleaded (R. 9):

> "The defendant denies that the plaintiff became totally and permanently disabled on or prior to January 26, 1931, and denies further that the said United States Government Five-Year convertible term policy matured on or prior to January 26, 1931."

At the conclusion of all of the evidence (R. 44) the government moved the court to return a verdict in favor of defendant on account of the alleged failure of plaintiff to adduce substantial evidence of permanent and total disability while his insurance contract was in force; and upon the ground that if there was proof of permanent and total disability, same existed since 1924 and the policy upon which suit was brought was in effect until 1927. The court overruled this motion (R. 45) and upon the issue framed by the above mentioned pleadings the case was submitted to a jury who returned in respondent's favor the following verdict (R. 48):

> "We, the Jury, find the issues for the plaintiff, and fix the date of permanent and total disability at the latter part of 1924."

Thereafter, the Court overruled petitioner's motion theretofore made for a directed verdict and for findings of fact and conclusions of law (which proposed findings and

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claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *."

conclusions are not contained in the record now before this Court) to which action respondent excepted (R. 48).

The Circuit Court of Appeals affirmed (R. 57-60).

Certiorari was apparently granted because of a conflict between decisions of Circuit Courts of Appeal as to the effect to be given to an Act of Congress, no opposition to the government's petition for certiorari having been filed in this cause.

SUMMARY OF ARGUMENT.

Point One.

Judgment was correctly entered upon the jury's verdict in view of

(a) The pleadings, and

(b) The facts.

Point Two.

The Government is estopped from challenging the judgment

(a) Under the facts in this case.

(b) As a matter of law (Section 307, World War Veterans' Act, 1924, as amended July 3, 1930).

(c) As the long continued contemporaneous construction placed upon the law by the administrative officers of the Government charged with its enforcement should not be changed so as to disturb vested rights.

Point Three.

This legislation is remedial in nature and should be liberally interpreted so as to give effect to the intention of Congress.

Point Four.

The better considered decisions of the Circuit Courts of Appeal are in respondent's favor and the cases cited by petitioner do not correctly state the law applicable to this case.

ARGUMENT.

Point One.

Judgment was correctly entered upon the jury's verdict in view of

(a) The pleadings.

No allegation is made in any of the pleadings of permanent and total disability in 1924. Respondent had opportunity to plead that this insured became totally and permanently disabled in 1924, if so advised, but neglected to do this. Therefore, respondent is now barred from raising this defense as is here attempted.

In the case of *Lynch* v. *United States,* 292 U. S. 570, 78 L. ed. 1434, at page 579, this court held:

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

In an earlier case, *Standard Oil Co.* v. *United States,* 267 U. S. 76, this court held:

> "When the United States went into the insurance business, issued policies in familiar form, and provided that, in case of disagreement, it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business."

The rule is well settled that in the construction and interpretation of Government contracts the same general rules apply as in the case of contracts between individuals. 26 R. C. L. 1437; *Hollerback* v. *United States,* 233 U. S. 165, 34 S. Ct. 553, 58 L. ed. 898; *U. S.* v. *Bostwick,* 94 U. S. 53, 24 L. ed. 65. "* * * And the rule is well settled that, when the 'government * * * comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.' "

Cooke v. *U. S.*, 91 U. S. 389, 398, 23 L. ed. 237; *Standard Oil Co.* v. *U. S.*, 267 U. S. 76, 45 S. Ct. 211, 69 L. ed. 519; *Chesapeake & Delaware Canal Co.* v. *U. S.*, 250 U. S. 126, 39 S. Ct. 407, 63 L. ed. 889; *U. S.* v. *Bank of the Metropolis*, 15 Pet. 377, 392, 393, 10 L. ed. 774; *U. S.* v. *Barker*, 12 Wheat. 559, 6 L. ed. 728; *England Nat'l Bank* v. *U. S.* (C. C. A. 8th) 282, 121.

It will be seen that the issue as framed by the pleadings was whether the insured became permanently and totally disabled *after* the issuance of this converted insurance contract, *and prior to January 26, 1931.*

> "Now, if anything is settled in proceedings at law where a jury is impaneled to try the facts, it is, that the verdict must find the matter in issue between the parties, and the judgment of the court must conform to and follow the verdict." *Bennett* v. *Butterworth*, 11 Howard 669, at page 675.

The court reserved his ruling upon petitioner's requested instruction relating to permanent and total disability existing before the policy was applied for and did not instruct the jury on this point. As the contract sued upon was incontestable from date of issuance by virtue of the provisions of Section 307, World War Veterans' Act, 1924, as amended, it is clear that the requested instruction of petitioner relative to permanent and total disability before this contract was issued was improper and the trial court was correct in rejecting this contention. Therefore that part of the verdict reading "and fix the date of permanent and total disability at the latter part of 1924" (R. 48) should be rejected as mere surplusage. It relates to something more than the issue presented by the pleadings and was not before the jury. This verdict amounted to a general verdict for plaintiff upon the issues as framed by the pleadings.

The verdict in this case has the same effect as given by this Court to verdict in the case of *Bennett* v. *Harkrader*, 158 U. S. 440, 39 L. ed. 1046. In that case the statute un-

der which suit was instituted required the jury in an action for the possession of real estate to find as follows:

> "* * * if the verdict be for a plaintiff that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be."

The verdict in that case did not state in terms that the plaintiff was entitled to the possession of the property described in the complaint, or any part thereof; neither did it state the nature or duration of his estate in the property. Hence, it was insisted that the verdict was irregular and no judgment should be rendered thereupon. This Court in that case stated:

> "We do not think the defect, if it be one, is sufficient to vitiate the judgment. *Where the complaint alleges that the plaintiff is entitled to the possession of certain described property,* which is unlawfully detained by the defendant and the possession of which the plaintiff prays to recover, *a general verdict for the plaintiff is a finding that he is entitled to the possession of all the property described in the complaint.* * * * It would be purely surplusage to find in terms a priority of the right to purchase when that is the only question which can be litigated in such statutory action." (Italics supplied)

In the instant case as in the above mentioned case, we submit, that the part of the verdict reading—

> "We, the Jury, find the issues for the plaintiff (R. 48)"

amounts to a general verdict for the plaintiff and is sufficient for him to recover upon the facts set forth in the complaint; the remainder of said verdict is purely surplusage and the action of the lower courts should be here sustained.

Judgment was correctly entered upon the jury's verdict in view of

(b) The facts.

We take the position that it is not material under the issues made by the pleadings as to whether there is substantial evidence of permanent and total disability after the converted insurance contract herein sued upon became effective. However, should this Court feel constrained to examine into the evidence we maintain there is substantial evidence that this insured's disability became total and permanent *after* July 1, 1927.

The witness Schuttenmahier testified (R. 27-28) that between 1925 and 1931 Patryas "looked much worse. He was weaker." In 1931 in addition to other complaints, according to Schuttenmahier, Patryas "complained of headaches. Would be unconscious. There wasn't any life in him." Also in 1931 "when they went out for a walk things didn't look right to Patryas and he wondered why people stared at him," and when they would go out for a walk then he would have to hold Patryas up when he would get a sweating spell.

Conditions described by Mrs. Patryas clearly showed a changed condition after the mastoid operation on July 19, 1927 (R. 37). After that "he would get into a rage and choke me and throw things at me and would mistreat the children," and in 1929 he would not visit with people and would not go out alone. Took walks oftener in 1926 and 1927 than he did later. Would get crying spells and "get up in a fit, mistreat the children, etc."

The contract (R. 20) defined total permanent disability as follows:

> "Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is

founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. * * *"

If for the sake of argument it should be conceded that the petitioner's claim that the insured was totally disabled within the meaning of the contract, from 1924 up to July, 1927, still there is nothing to justify the contention that such "total disability" was "permanent" within the meaning of the last above quoted clause in the definition. The fact that the Government hospitalized him for a long period of time in 1927 and performed a mastoid operation in July of that year indicates that then there existed hope of improving his condition. The fact that his condition did not improve but became worse in many ways after this operation shows that it was not reasonably certain prior to the operation that he would not improve and again adjust himself to civil life in some gainful occupation. We suggest that the mastoid operation demonstrated that his trouble was an organic brain disease which by that time became incurable as testified to by Dr. Hulbert (R. 38-40).

Even though plaintiff may have been unable to work before 1927 still it was not then "reasonably certain that the total disability will continue" throughout his life. Not until after it was demonstrated by the mastoid operation that his trouble was not caused by the mastoid condition was it reasonably certain that the condition would continue, and therefore be permanent within the meaning of the definition of permanent disability as fixed by the policy (R. 20).

It is to be noted that plaintiff's disabilities according to the defendant's own reports prior to 1927 showed a condition of psychoneurosis neurasthenia on a constitutional inferiority basis (R. 22). The jury in this case intended for plaintiff to recover. By their verdict and judgment they undoubtedly adopted the theory of disability as testified to by Dr. Hulbert, that is, a disability of the brain and of

the mind from an organic shellshock which impaired him mentally and that on or before December, 1930, and after 1927 he could not be gainfully employed and his condition would not improve (R. 38-39).

Point Two.

The Government is estopped from challenging the judgment.

(a) Under the facts in this case.

The government took the position in all of its conduct prior to trial that respondent was never permanently and totally disabled. This position was taken in reinstating this insurance, in denying this claim of permanent and total disability before suit as well as denying in its answer filed in court the fact of the insured's total and permanent disability "on or prior to January 26, 1931", thereby contending this insured was never totally and permanently disabled. Too, the government knew the insured's condition at the time his insurance was reinstated because he was then in a government hospital receiving treatment from government physicians. The government, the facts disclose, was better informed of the insured's health than was the insured himself.

It was stipulated (R. 19-20) that on January 31, 1918, respondent was issued a $10,000 contract of yearly renewable term insurance which lapsed for nonpayment of premium due August 31, 1919; and that on June 28, 1927, this $10,000 insurance contract was reinstated and converted into a Five-Year Convertible term policy. This reinstatement was effected by creation of a lien of $773.90 covering payment of premiums from date of lapse until date of reinstatement, with interest, effective July 1, 1927, under the liberal provisions of law permitting veterans suffering from injury or

disease contracted in the active military or naval service during the World War.[3]

It will be observed that as a condition to this reinstatement it was necessary that the Director of the Veterans' Administration find as a fact that respondent was *not to-*

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[3] The amendment of the World War Veterans' Act of July, 3, 1926, provided: "Sec. 15. That section 304 of the World War Veterans' Act, 1924, approved June 7, 1924, is hereby amended to read as follows: 'Sec. 304. In the event that all provisions of the rules and regulation other than the requirements as to the physical condition of the applicant for insurance have been complied with and application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this amendatory Act or within two years after the date of lapse or cancellation: *Provided,* That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further, That the applicant during his lifetime submits proof satisfactory to the director showing that he is not totally and permanently disabled.* As a condition, however, to the acceptance of an application for the reinstatement of lapsed or canceled yearly renewable term insurance, where the requirements as to the physical condition of the applicant have not been complied with, or, for the reinstatement of the United States Government life insurance (converted insurance), the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rate of 5 per centum per annum, compounded annually, on each premium from the date said premium is due by the terms of the policy; *Provided further,* That where within one year of this amendatory Act all of the requirements for reinstatement of yearly renewable term insurance under this section are complied with, except the payment of unpaid premiums with interest, and proof satisfactory to the director is furnished showing the applicant is unable to pay such premiums with interest or some part thereof, the application may be approved, and the amount of unpaid premiums with interest as provided in this section shall be placed as an interest bearing indebtedness against the insurance, such indebtedness to bear interest at the rate of 5 per centum per annum, compounded annually, to be deducted in any settlement thereunder: *And provided further,* That no yearly renewable term insurance shall be reinstated after July 2, 1927'." (Italics supplied.)

tally and permanently disabled at time of reinstatement on June 28, 1927. Premiums were thereafter paid by respondent on his contract of insurance and accepted by petitioner without question for a period of five years, through May, 1932.

Ample opportunity was afforded petitioner before the evidence in this case was presented, to raise the defense here urged. Petitioner failed and neglected to do this. Petitioner's position with respect to respondent's disability for a period of five years preceding this suit, as evidenced by its receipt each month of the premium payments made by respondent, its re-instatement and conversion of respondent's insurance contract and its denial of respondent's permanent and total disability on or prior to January 26, 1931, has consistently been that respondent was not totally and permanently disabled over this period of time. For petitioner to wait until after all the evidence was presented in this case to then attempt to raise the defense that respondent was totally and permanently disabled before this contract of insurance was issued, when it was then too late for respondent to combat a defense of this character, after respondent had been lulled into a sense of security, would not only be eminently unfair but would operate as placing a premium upon such action on the part of Government officials. Certainly this court should not permit respondent to thus take advantage of his own wrongs.

The Government is estopped from challenging the judgment

(b) As a matter of law (Section 307, World War Veterans' Act, 1924, as amended July 3, 1930).

The Attorney General of the United States, on January 4, 1921 (32 Op. A. G. 379-390), ruled as follows:

> "* * * where * * * a soldier protected by term insurance, who has suffered disability which has been rated by the Bureau of War Risk Insurance as less than total

> permanent, applies for conversion, and same is granted, the conversion is good, for thereafter the soldier will be estopped from claiming, *and the War Risk Insurance Bureau will be estopped from finding as a fact, that at the time of conversion the applicant for conversion was totally and permanently disabled and therefore ineligible for same.*" (Italics supplied)

The legislative history of the incontestability provision clearly shows that it was the intention of Congress to make all contracts of insurance incontestable.

The Government is estopped, as a matter of law, by virtue of the provisions of Section 307, World War Veterans' Act, 1924, as amended, from challenging this judgment.

It is a legal presumption that one is not permanently and totally disabled when he applied for conversion of his insurance, whatever the evidence may show as to his state of health at that time. This presumption is required by the incontestability provision of the law, as construed and applied by the Veterans' Bureau, and as it was intended by Congress to operate, according to the Committee reports on the original incontestability provision in the Act of August 9, 1921 and on said provision as amended by the Act of July 3, 1930.

The first incontestability provision was contained in the Act to establish the Veterans' Bureau, approved August 9, 1921 (42 Stat. 147, 157). Section 30 of said Act added the following as a new section to Article IV of the War Risk Insurance Act:

> "Section 411. Subject to the provisions of Section 29 of the War Risk Insurance Act and amendments thereto policies of insurance heretofore or hereafter issued in accordance with Article IV of the War Risk Insurance Act shall be incontestable after six months from date of issuance, or reinstatement, except for fraud or nonpayment of premiums."

In construing this section it is to be borne in mind that, as the Attorney General had held in his said opinion of

July 18, 1919, original war risk term insurance could not validly be issued to a person who was totally and permanently disabled. It is also to be remembered that, under Bureau regulations and the opinions of the Attorney General, such insurance could not validly be reinstated or converted if at the time of application therefor the applicant was totally and permanently disabled.

Thus, in his opinion to the Secretary of the Treasury, dated January 4, 1921 (32 Op. A. G. 379) the Attorney General had also held, according to the headnote to said opinion:

> "A policy of term insurance matures into a claim upon the occurrence of either the death or total disability of the insured, and after the happening of either of these events there is no term insurance left which is subject to conversion under the terms of the War Risk Insurance Act."

And by Section 408 of the War Risk Insurance Act, also added to said statute by the Act of August 9, 1921, Congress provided specifically for the reinstatement and/or conversion of war risk insurance upon the condition, among others, that the applicant, in his lifetime, submitted proof satisfactory to the Director of the Veterans' Bureau that he was not totally and permanently disabled.

The right of the courts to look to the reports of committees of Congress to ascertain the legislative intent, where the meaning of the statute is obscure or doubtful is well settled. *Duplex Co.* v. *Deering*, 254 U. S. 443, 474, 51 S. Ct. 1172, 65 L. ed. 349, 16 A. L. R. 196; *Huntley* v. *Gile* (C. C. A.) 32 F. (2d) 857.

The purpose of adding said Section 411 to the War Risk Insurance Act was thus stated in House Committee Report No. 104, 67th Congress, 1st Sess. on H. R. Bill 6611, which became said Act of August 9, 1921:

> "Section 29 provides that, subject to the provisions of section 29 of the war risk insurance act and amend-

ments thereto, policies of insurance heretofore or hereafter issued in accordance with Article IV of the war risk insurance act, shall be incontestable after six months from the date of issuance or reinstatement, except for fraud or nonpayment of premiums.

It is the opinion of your committee that a provision of this kind placed in the law *would add stability to the policies* issued or hereafter issued by the Government *and give assurance that only in case of fraud or nonpayment of premiums would payment of the insurance be denied.* A provision similar to this is usually found in the policies issued by private companies and has been found to be mutually beneficial to all concerned." (Italics supplied.)

Senate Committee Report No. 231 on bill H. R. 6611 incorporates therein said House Report No. 104, which, it said, "describes each section of the bill as it passed the House and is hereto appended and made a part of this report."

The statement in said House Committee Report No. 104 that a provision of the kind embodied in Section 411 "would add stability to the policies issued or hereafter issued by the Government *and give assurance that only in case of fraud or nonpayment of premiums would payment of the insurance be denied,*" shows that the incontestable provision was intended to be liberally construed.

And it appears that the Veterans' Bureau, from the passage of the Act of August 9, 1921, construed and applied the incontestability provision accordingly; that is to say, after the six months period of contestability had elapsed, the Veterans' Bureau held that the Government was obligated to pay the insured the disability allowances authorized by his policy, regardless of the fact that the total and permanent disability from which it found him to be suffering might have occurred prior to his application for such insurance, whether original, reinstated or converted.

That such was the contemporaneous, uniform and long-continued practical construction of the incontestability pro-

vision also appears from the statement of General Hines, Administrator of Veterans' Affairs, and Mr. Roberts, the Solicitor of Veterans' Affairs, before a Senate committee in support of the bill which led to the adoption of the amendments to Section 307 of the World War Veterans' Act, 1924, made by the Act of July 3, 1930 (the provisions of Section 411 of the War Risk Insurance Act, as amended March 4, 1923, having been incorporated in the World War Veterans' Act, 1924, as Section 307). The following quotation from the hearings before the Sub-committee of the Senate Committee on Finance on H. R. 10381, 71st Cong. 2d Sess. (Hearings, pp. 90-91) is significant (Italics supplied):

> GEN. HINES. Section 23 of the bill amends section 307 of the act by making all contracts of insurance issued by the Government incontestable from date of issuance except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces. This is a very sweeping amendment and will place beyond contest many contracts and policies of insurance which otherwise would be contestable. It is a well recognized principle of commercial insurance companies, however, *and in reality is only a clarification of the existing law which was practically nullified by a recent decision of the Comptroller General.* It is believed that some such provision is necessary to stabilize Government insurance, and to insure to the veteran and his beneficiary the payment of the insurance at date of permanent and total disability.
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> I would like to have Mr. Roberts explain the decision of the comptroller and its effect, if he may.
>
> MR. ROBERTS. Mr. Chairman, the present World War Veterans' Act of 1924, as amended, contains a provision to the effect that where a policy is maintained in force for a period of six months, it should be incontestable, except for fraud or nonpayment of premiums. *We have followed that, and in all cases where the policy has remained in force for six months we have paid the claim, irrespective of the merits of it,* unless there

was fraud or failure to pay premiums. The only cases that have been excepted from that section of the act were where the man originally did not have the right to apply for the insurance, such as a man who was not in the military service, who erroneously made an application, and through an error it was accepted. However, under date of January 16, 1930, *notwithstanding the long practise of the bureau,* the Comptroller General, in the case of Mabry W. Woodall, held that if a man was permanently and totally disabled at the time he applied for reinstatement of insurance, or conversion of insurance, no matter if he paid the premiums for 10 or 15 years, if the bureau was to administratively *then* determine that *10 years before* he had been permanently and totally disabled at the time he applied, the policy was not incontestable, the statute did not protect it, and the man would have no rights, or his beneficiary would have no rights, whichever was the case.

This was, of course, an overturning of a practise not only in the bureau, but a practise which obtains with all commercial insurance companies. The very purpose of an incontestable clause is to give some stability to the policies, and while the amendment was not recommended by the bureau, we felt the weight and force of the argument in favor of it."

The decision of the Comptroller General in the *Woodall Case,* to which General Hines and Mr. Roberts referred, was rendered January 16, 1930 (9 Comp. Gen. 291). The facts of that case as stated in said decision were as follows: Woodall applied on July 2, 1927 for the reinstatement and conversion of his lapsed policy of war risk term insurance. October 3, 1927, the application for reinstatement was marked "acceptable" and in January, 1928, a policy was issued effective July 1, 1927. The veteran died on February 11, 1928, and on January 9, 1928, the veteran was found permanently and totally disabled on November 21, 1927, by reason of tuberculosis. June 2, 1928, the appeal group on central office cases found the veteran permanently and totally disabled from April 20, 1925, a date prior to his

application for reinstatement and conversion. September 10, 1928, the Director approved a recommendation of the advisory group on appeals of August 23, 1928, which confirmed the onset of the permanent and total disability from April 20, 1925, to the date of death. The Comptroller General held that the converted insurance lapsed on August 1, 1927, one month after its effective date, and that the permanent and total disability rating of Woodall made by the Bureau on January 9, 1928, stopped the running of the period of six months fixed by Section 307 of the World War Veterans' Act, 1924, for contesting Government insurance. Even if there had been no lapse, the Comptroller General said, certain decisions of the Federal Courts cited by him would have to be considered, observing:

> "* * * These decisions seem to place the happening of permanent and total disability on exactly the same basis as the happening of death, and if either has in fact occurred prior to application, reinstatement or conversion of insurance, there is nothing under the provisions of the World War Veterans' Act on which to issue insurance, and if, through a mistake, a policy has issued to one in fact dead or permanently and totally disabled, the Government may not be obligated thereunder."

Referring further to decisions of the Federal Courts, the Comptroller General said (Italics supplied):

> "These decisions not only sustain the views of this office, but go further and place *no time limitation* on the Veterans' Bureau within which there may be determined that the insured was in fact permanently and totally disabled when originally applying for insurance or applying for reinstatement and/or conversion thereof. * * *
>
> Accordingly, the rule may be stated that where the Veterans' Bureau has heretofore established or may hereafter establish the condition of permanent total disability at or prior to the date of original application for insurance, or application for reinstatement and/or

conversion of insurance *by a rating made at any time prior to the first payment of insurance under the policy,* the insurance should be considered as invalid and no payments made thereunder, leaving the parties in interest to their recourse in the United States courts as provided by the statute."

It was to overcome this sweeping decision of the Comptroller General and to reestablish the previously existing and long-continued practice of the Veterans' Bureau, that the Veterans' Administration itself sought the amendment of Section 307 of the World War Veterans' Act made by the Act of July 3, 1930, making "all contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted" incontestable from date of issuance, except for fraud, or nonpayment of premiums.

Senate Report No. 1128, 71st Cong. 2d Sess., on H. R. Bill 13174, which became the Act of July 3, 1930, states (pp. 9-10):

"Section 24 amends section 307, which relates to the incontestability of insurance contracts. The purpose is to make all contracts or policies of insurance incontestable from date of issuance, reinstatement, or conversion, for all reasons except fraud, nonpayment of premiums, or that the applicant was not a member of the military or naval forces of the United States. *This incontestability would protect contracts where they were not applied for within the time limit required, where the applicant was not in the required state of health, or was permanently and totally disabled prior to the date of application, or for any other reasons except those specifically mentioned in the statute.* It is appreciated that this is a broad provision, but it was felt that it was necessary in order to do justice to the veterans, to place this insurance on a parity with commercial insurance companies from a stability standpoint, and to overcome decisions of the Comptroller General which practically nullify the section as it now exists. Further provision is made permitting the insured to elect after a reinstatement or conversion to go back to some prior contract and claim rights there-

under; and if he proves himself entitled to such rights, upon surrender of the latter contract or contracts, to be paid under the prior contract. *The purpose is to prohibit the raising of estoppel against the claimant either in or out of the courts because of his reinstatement or conversion of his insurance.* Provision is also contained whereby suit may be brought either in the original action, or by alternative plea in the same suit with a subsequent contract of policy. Recovery, however, can only be effected upon one of the contracts or policies. The effect of the present practice of the bureau in raising estoppel is to penalize the man who pays his premiums or tries to continue all or a part of his insurance in force. This amendment is specifically made retroactive in order that in any case where the claim has been heretofore disallowed on the ground of estoppel, or because of the policy not being incontestable, the insured, or the beneficiary under such contract or policy may, if he/she so elects, have the benefit thereof. It is contemplated that payments in cases of contracts or policies incontestable under this section will begin from date of maturity of such contracts or policies."

House Report No. 874, 71st Cong. 1st Sess. (pp. 14-15) used the same identical language with respect to the like provision in H. R. Bill 10381 for which H. R. Bill 13174 was substituted.

Reading the italicised statement in said Senate Report as to the purpose of the amendment to the incontestability provision of Section 307 in the light of the construction which the Veterans' Bureau had placed upon such provision from the time of the passage of the Act of August 9, 1921, in which it first appeared, as well as in the light of the Comptroller General's decision in the Woodall case, as to both of which matters said Committees appear to have been advised, there is no escaping the conclusion that said Committees understood, and Congress must be presumed to have intended, that the amendment to the incontestability provisions of Section 307 then under consideration would

preclude the Government from denying liability on any insurance contract or policy theretofore or thereafter issued on the ground that the insured was totally and permanently disabled prior to its issuance, reinstatement or conversion.

The provision of Section 307, as amended July 3, 1930, that "the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or bring suit under section 19 of this Act on any prior contract or policy," is in accord with the statement in said Committee Reports as to the purpose of making any such contract or policy incontestable from date of issuance. The incontestability provision, as construed by the Bureau and understood by the House and Senate Committees, would preclude any contest of the policy on the ground that the insured was totally and permanently disabled prior to his application for insurance. If the incontestability provision of the statute prevents the Veterans' Administration from denying payment of any contract on the ground that the insured was totally and permanently disabled prior to the time he applied for insurance, it also prevents the Court from doing so in a suit on said contract. The inhibition is upon the government itself, and therefore upon all its agencies concerned in the administration of the laws relating to such insurance.

It was never contemplated by Congress that any such insurance so granted should be subject to cancellation, *at some remote date,* by the Bureau or the Courts, upon a finding then made that the applicant was totally and permanently disabled at the date of his application.

It is to be remembered, in this connection, that the law authorized both term and converted insurance to be granted "without medical examination." Hence, a soldier, although *totally* disabled from injury or disease prior to his application, was nevertheless insurable against said total disability becoming permanent while his insurance was in force, as well as against death. It was for this reason, presumably, that the Attorney General held, as stated in his

opinion of July 18, 1919 (31 Op. Atty. Gen. 534) that a soldier was insurable even though *mortally ill* at the time of his application.

In these circumstances it was but reasonable and just that Congress should later act as it did to remedy this situation, first by making *all* contracts or policies of insurance, whenever issued, incontestable after a comparatively short period, except for fraud and nonpayment of premiums: and, finally, by making *all* such contracts or policies incontestable from date of issuance, reinstatement or conversion.

The Government is estopped from challenging the judgment

(c) As the long continued contemporaneous construction placed upon the law by the administrative officers of the Government charged with its enforcement should not be changed so as to disturb vested rights.

On December 16, 1921, the General Counsel of the Veterans' Administration promulgated instructions (see pages 59 and 60 of petitioner's brief, appendix) to the effect that if an application for reinstatement of insurance was approved and subsequently a rating of permanent and total disability was made effective as of a date prior to the date of reinstatement, such action on the part of the Bureau would not affect the validity of the reinstatement of insurance.

After the amendment of July 3, 1930, Administrator's Decision No. 41 was promulgated on April 10, 1931, which established the administrative policy (petitioner's brief, appendix, pages 62-63) of maturing reinstated contracts of converted insurance as of effective dates notwithstanding that the insureds were thereafter rated as having become permanently and totally disabled at a date prior to the reinstatement and conversion of such insurance. This administrative policy continued until July 26, 1932, when one of the courts held *contra* (petitioner's brief, appendix, page

62). No further instructions have been issued in view of the decision in this case (petitioner's brief, appendix, page 67).

This contemporaneous construction of this Act given by the Executive Department of the Government charged with the responsibility of its administration continued as it has over these years certainly consorts with the equities involved, is entitled to great respect and should be given weight. *United States* v. *The Alabama Great Southern Railroad Co.*, 142 U. S. 615; *National Lead Co.* v. *United States*, 252 U. S. 140.

As was said by this Court in the case of *United States* v. *The Alabama Great Southern Railroad Co.*, 142 U. S. 615:

> "We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that Department; a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case, should be considered as decisive in this suit. It is a settled doctrine of this Court that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

In the cases of *Anderson* v. *U. S.*, 36 Fed. (2d) 45 and *Jordan* v. *U. S.*, 36 F. (2d) 43, and *U. S.* v. *Jensen*, 36 F. (2d) 47, referred to in petitioner's brief, and the cases of *Kenneth E. Banks* v. *United States*, 36 F. (2d) 47 and *U. S.* v. *Crawford*, 40 F. (2d) 199, it is understood that the government paid the insurance after the enactment of the amendment to the War Risk Insurance Act on July 3, 1930, when Section 307, *ante*, was passed, notwithstanding the Circuit Courts of Appeal decisions.

Point Three.

This legislation is remedial in nature and should be liberally interpreted so as to give effect to the intention of Congress.

The Circuit Courts of Appeal decisions cited by petitioner in support of its contention relate to yearly renewable war risk term insurance and do not refer to United States Government Life Insurance.

A remedial statute must be construed liberally so as to afford all the relief within the power of the court which the language of the act indicates that the legislature intended to grant. *Ross* v. *Doe,* 1 Pet. 665, 7 U. S. (L. ed.) 302; *United States* v. *Padelford,* 9 Wall. 531, 19 U. S. (L. ed.) 788; *Twenty Per Cent Cases,* 13 Wall. 568, 20 U. S. (L. ed.) 707; *Jones* v. *New York Guaranty, etc. Co.,* 101 U. S. 622, 25 U. S. (L. ed.) 1030; *Beley* v. *Naphtaly,* 169 U. S. 353, 18 S. Ct. 354, 42 U. S. (L. ed.) 775; *United States* v. *Southern Pac. R. Co.,* 184 U. S. 49, 22 S. Ct. 285, 46 U. S. (L. ed.) 425.

The law with respect to war risk insurance contracts is entitled to the most liberal construction in favor of the disabled veteran. *U. S.* v. *Cox* (C. C. A. 5), 24 Fed. (2d) 944; *McNally, et al.* v. *United States* (C. C. A. 8), 52 Fed. (2d) 440; *U. S.* v. *Phillips* (C. C. A. 8), 44 F. (2d) 689; *Glazow* v. *U. S.* (C. C. A. 2), 50 F. (2d) 178; *U. S.* v. *LePage* (C. C. A. 1), 59 F. (2d) 165; *U. S.* v. *Clarence P. Arzner,* 287 U. S. 470.

Point Four.

The better considered decisions of the Circuit Courts of Appeal are in respondent's favor and the cases cited by petitioner do not correctly state the law applicable to this case.

The case of *United States* v. *Chandler,* decided May 8, 1935, by the Fifth Circuit Court of Appeals (77 F. (2d) 452) in opinion by Circuit Judge Hutcheson, which was fol-

lowed by the United States Circuit Court of Appeals for the Seventh Circuit in the instant case, stated:

> "We do not agree with defendant that it may, in this proceeding, claim that plaintiff was totally and permanently disabled in 1925, when his original policy was reinstated, and that because he was he cannot recover now. We think the issuance of that policy is such an affirmation that there was a risk to be insured against as that defendant may not, on this evidence assert that the risk did not exist, or defeat recovery on these policies on the ground of an already existent disability without pleading and proof of fraud in securing the reinstatement. We think it clear that plaintiff can recover on the reinstated and extended policies upon proof that in December, 1930, he was totally and permanently disabled, and that he may not, absent proof of fraud in procuring his reinstatement, be defeated of recovery by the showing the proof makes that there was a disablement existing when the policies were reinstated."

The fundamental error in the reported decisions cited by petitioner is that they assume it was the intention of Congress in Section 400 and 401 of the War Risk Insurance Act, to grant *term insurance* against *death only* where a soldier had become totally and permanently disabled prior to applying for such insurance, as stipulated in War Risk Bulletin No. 1; whereas it is apparent from the language of said sections, and their legislative history, that the *sole* right of a soldier who had become totally and permanently disabled prior to making application for insurance, was to receive *automatic insurance* also provided for in Section 401. Hence said provision in War Risk Bulletin No. 1, upheld by said Circuit Courts of Appeals as valid, was in fact invalid, as in effect held by the Attorney General in his opinion of July 18, 1919.

The error of said Circuit Courts of Appeals in the decisions referred to in Petitioner's brief is fundamental because if a soldier, who had become totally and perma-

nently disabled before application for insurance, could not take out a valid policy of *term* insurance, then a refusal to pay disability benefits under such a policy on the ground of such prior disability would amount to an attack on the *validity* of the entire policy, and not merely to a dispute as to whether he came within the *coverage* of the policy, as said Circuit Courts of Appeals held.

Such a denial—being an attack on the validity of the insurance granted in its entirety—would necessarily be prohibited by the incontestability provision of the law, both as originally written in the War Risk Insurance Act by the Act of August 9, 1921, and as later reenacted as Section 307 in the World War Veterans' Act, 1924.

Another matter of great importance, militating against the correctness of said decisions of the Circuit Courts of Appeal is that, as above stated, such courts were apparently not advised, and therefore gave no consideration to the contemporaneous, uniform and long-continued practical construction of the Veterans' Bureau of the incontestability provision of the law governing these insurance contracts or policies—a construction which was called to the attention of the Committees of Congress which reported the amendment to said Section 307 made by the Act of July 3, 1930, and which amendment was made for the expressly declared purpose of overcoming the ruling of the Comptroller General, in 1929, adverse to the Bureau's long-established practical construction of said incontestability provision.

Cases cited by Petitioner relate to term insurance, while the contract here under consideration is for *converted insurance.*

In the case of *Hicks* v. *U. S.*, 65 F. (2d) 517, cited by petitioner in its brief filed herein, Circuit Judge Parker of the Fourth Circuit Court of Appeals first held that Section 307 as amended by the Act of July 3, 1930, forbade the government from contesting liability on the contract of war risk insurance on the ground that the insured was disabled when

the policy was applied. The *Hicks case, supra,* it will be remembered was a case involving term insurance only. Upon rehearing, however, he reversed his previous decision but clearly pointed it out in the latter decision (65 F. (2d) 517) that:

> "* * * the purpose of Congress in enacting the incontestable provision of the statutes, we think on further consideration, was not to enlarge or extend the coverage of policies issued under this regulation to persons who were totally and permanently disabled at the time of application, *but to prevent,* among other things, *the forfeiture of reinstated or converted policies on the ground of the prior disability of the insured.* An examination of the rulings of the Comptroller General shows that reinstated policies had been held void for this reason; and, as pointed out by Judge Fee in the *Stavros* case, it was to this that the committees of Congress were referring in their report from which we quote in our former opinion." (Italics supplied.)

The opinion on rehearing was based largely on the case of *Stavros* v. *U. S.,* 3 Fed. Sup. 213. That, however, was a case on Automatic Insurance and held that Automatic Insurance did not cover a disability existing at the time the veteran entered the army. The court said in the *Stavros case,* p. 218:

> "It seems eminently proper that where the United States has permitted a soldier to reinstate a policy which he carried during his war service in the absence of fraud it should not be permitted to discover permanent total disability has existed within six months after the re-issue and avoid recovery. The re-issue should relate back to the date of the original policy."

It is to be noted that in the instant case the trial court instructed definitely that the disability must be permanent and total before the insurance lapsed in 1932.

Jordan v. *U. S.,* 36 F. (2d) 43, was an action on a War Risk Insurance Policy, not a converted policy. The defen-

dant there in its answer set up the affirmative defense that "if the plaintiff was disabled at all he was as much disabled at the time of the issuance of the policy as at any time subsequent thereto and that he suffered no loss." The issue was whether or not he was totally and permanently disabled prior to the issuance of the original War Risk Insurance. No such issue was raised in the case at bar until it was too late for plaintiff to meet the issue by clearing up that point. In holding that "a policy of insurance does not ordinarily cover a loss already suffered" the court said:

> "It may well be that a recovery might be had thereunder for a permanent total disability which did not exist at the time the insurance was applied for in the event the applicant should recover from the earlier permanent total disability and again become totally and permanently disabled."

By analogy we suggest it is entirely possible that Patryas, even though he became permanently and totally disabled in 1924 through the years of rest might have for a period ceased to be considered permanently disabled by reason of the hope of improvement by removal of mastoid infection, and when this did not result he might again very properly be held to be permanently and totally disabled.

In this case judgment was entered on April 21, 1930, counsel is informed by the Clerk of the United States District Court at Phoenix, Arizona, and same was paid by the government.

In the case of *Schmidt* v. *U. S.*, 63 F. (2d) 390, cited by petitioner in its brief filed herein, the Circuit Court of Appeals for the Eighth Circuit held that the provision in War Risk Bulletin No. 1 that "if the insured became totally and permanently disabled before this policy was applied for, it shall nevertheless be effective as life insurance, but not as insurance against each disability," was valid and to be deemed a part of the policy of war risk insurance issued to the appellant. That court sustained the action of the Dis-

trict Court in directing a verdict for the defendant on the ground that the evidence clearly showed that he was permanently and totally disabled at or prior to the time he secured his insurance contract.

No reference is made in that decision to the amendment to Section 307 made by the Act of July 3, 1930, or to the Committee Reports on said Act. And the opinion of the Attorney General of July 18, 1919, while incidentally referred to, was not analyzed by the Circuit Court of Appeals, nor its real scope and effect considered, so far as it bore upon the validity of the provision in said Bulletin No. 1 which the Court held to be valid. The permanent and total disability in that case had reference to the original War Risk Insurance policy at the time of entering the service, and not to converted insurance as is here involved.

An interesting discussion is had there on the question of the effect of the defendants not pleading the defense of a permanent and total disability at the time the policy was issued. The Court held that the benefit of the failure to so plead was waived by the plaintiff by not raising the question in the trial court and not assigning it as error. It is to be noted that in the case at bar this defense was not raised by the pleading and we raised the question as soon as such a contention became evident and are, we contend, entitled to the benefit of whatever admissions may be inferred from the fact that the only defense raised in our case was that the permanent and total disability did not exist prior to January, 1931.

Kaminsky v. *U. S.*, 64 Fed. (2d) 735, was a suit based on the War Risk Insurance policy and not a converted policy. The question involved there was whether he was totally disabled when he entered the army and that due to the mistakes or blunders of others a mental defective and imbecile entered the army and obtained insurance. The defect, being promptly discovered, he was discharged. The holding of the court was that the incontestable clause of the statutory War Risk Insurance did not preclude the gov-

ernment from defending on the ground of total and permanent disability existing *before insured entered the army.* In that case Judge Foster gave a strong dissenting opinion (which later became the unanimous opinion of the court in *U. S.* v. *Chandler,* 77 F. 452), in which he said:

> "In my opinion it was clearly the intention of Congress to close the door to any inquiry as to the mental and physical condition of the insured prior to the issuance of the policy of War Risk Insurance. This conclusion finds support in the well considered opinion of *Hicks* v. *U. S.,* 65 Fed. 517, decided January 10, 1933."

The majority opinion in the *Kaminsky case* did not discuss the Senate and House Committee Reports on the amendatory Act of July 3, 1930, nor recognize the scope and effect of the opinion of the Attorney General of July 18, 1918.

Circuit Judge Foster dissented in that case on the ground that the evidence of a physician skilled in mental diseases, excluded by the District Court, tending to show that Kaminsky was totally and permanently disabled because of his mental condition prior to his application for insurance, was of doubtful value and there was abundant evidence in the record, though disputed, to the same effect. The undisputed evidence, Judge Foster said, tended to prove that Kaminsky was strong physically, and healthy when drafted, and had been continuously engaged in a substantially gainful occupation, while the record left no doubt that at the time of his discharge from the Army he was in poor health and permanently and totally disabled.

A further ground of dissent was stated by Judge Foster as follows:

> "2. The District Court excluded the evidence of Dr. Green on the ground that the policy was incontestable from date under the provisions of the Act of July 3, 1930, sec. 24 (38 USCA, Sec. 51). Under the provisions of said Act all policies of war risk insurance there-

tofore issued were made incontestable from the date of issuance except for fraud, nonpayment of premiums or on the ground that the applicant was not a member of the military or naval forces of the United States. This section was made retroactive to April 6, 1917. It seems that the majority of the court would interpolate another exception into the statute and, in order to accomplish this, the theory is adopted that a defense based on the ground that permanent and total disability of the insured existed before he entered the Army is not a contest of the policy. The unsoundness of this theory is demonstrated by merely stating it, as the urging of any defense that would defeat a recovery would necessarily be a contest of the policy.

* * * * *

The provisions of the Act of 1930 are so plain as to hardly require construction, but if they do so the Committee reports submitting the bill may be looked to for light. Under the terms of the section as originally enacted policies did not become incontestable until six months after issuance. Act June 7, 1924, sec. 307 (38 USCA Sec. 518). Construing that section the Comptroller General had ruled, in effect, that the existence of permanent and total disability when originally applying for insurance, or reinstatement thereof, might be set up as a defense at any time. See the following cases: *Mary W. Woodall,* Jan. 16, 1930, 9 Comp. Gen. 291; *Philip McNish,* Mar. 9, 1928, 7 Comp. Gen. 551; *Marion Artley,* Jan. 23, 1929, 8 Comp. Gen. 387. There are other rulings of the Comptroller General to the same effect. The Committee reports Senate Report 1128, and House Report 874, 71st Cong., 2d Session, in practically identical language, say this * * There is no doubt in my mind that in enacting the statute Congress intended to prevent metaphysical rulings by bureaucracy and to avoid just such controversies as that herein presented. In my opinion it was clearly the intention of Congress to close the door to any inquiry as to the mental and physical condition of the insured prior to the issuance of the policy of war risk insurance."

In the case of *United States* v. *Stevens*, 64 F. (2d) 853, the Circuit Court of Appeals for the Eighth Circuit (Judge Van Valkenburg dissenting) held (reversing the District Court) that the insured could not recover on his reinstated policy of war risk insurance because the lower court had found that he had become disabled some time after the original policy had lapsed for nonpayment of premiums and several years before his application for the reinstatement of said policy.

In the majority opinion the court said:

> "We have failed to find, however, either in the statutes or in the debates or Committee reports of Congress relative thereto, any intention that the terms of the contract of insurance, whether original or reinstated, have changed in respect to the coverage of permanent and total disability. The terms of such contracts in that respect have remained as fixed by Bulletin No. 1, viz: that the United States insures the applicant, conditioned on the payment of premiums, for the amount of $...., payable to the insured if he, *while this insurance is in force, shall become* totally and permanently disabled." (Italics supplied).

An examination of the opinion of the majority of the court in the *Stevens case, supra,* shows, however, that it apparently confined its examination of the legislative history of the amendments to Section 307 made by the Act of July 3, 1930, to the debates and committee hearings with reference to the provision in the amendatory Act removing the bar of estoppel, which bar had theretofore been interposed by the Veterans' Bureau to a claim on an original contract where said contract had been reinstated or converted. The majority opinion quotes quite extensively from said debates and hearings on this question of estoppel, which Congress, in the Act of July 3, 1930, sought to overcome by enabling the insured to sue on any prior contract, if he chose to do so, without prejudicing his rights, where he also had a reinstated or converted contract. This

was because said Circuit Court of Appeals had previously held, in a former suit (*Stevens* v. *United States*, 29 F. (2d) 904), that plaintiff was estopped from suing on his original contract of war risk term insurance, which had lapsed for nonpayment of premiums.

Circuit Judge Van Valkenburg dissented in the second Stevens case on the ground that the Circuit Court of Appeals should be governed by its decision on the former appeal. He also thought that "the presumption that, prior to reinstatement, appellee was not permanently and totally disabled, must be upheld under the circumstances attending the act of reinstatement."

We feel that this Honorable Court in affirming this case should direct that the judgment entered herein be amended so as to provide for the refund to respondent of premiums paid on his converted insurance contract subsequent to the month of its issuance.

CONCLUSION.

In view of the foregoing it is respectfully submitted that the action of the Circuit Court of Appeals should be affirmed by this Court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 445.—October Term, 1937.

The United States of America, Petitioner, *vs.* Stanley J. Patryas.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 28, 1938.]

Mr. Justice Black delivered the opinion of the Court.

January 31 1918, Stanley J. Patryas (respondent), then a soldier, purchased from the government a $10,000 yearly renewable War Risk Insurance contract which he permitted to lapse after his honorable discharge from the Army July 29, 1919. June 28, 1927, while a patient at a Veterans' Government Hospital, he obtained reinstatement of his War Risk policy and immediately converted it into a five year renewable term policy upon which he paid premiums to June 1932. Claiming total permanent disability, the veteran obtained, in the District Court, a verdict and judgment on his reinstated policy. Finding the issues for the veteran, the jury fixed the date of permanent total disability at 1924—a date three years before his policy was reinstated.

The Court of Appeals affirmed.[1]

The government's right to contest this policy is limited by the following statutory provision:[2]

"... policies of insurance ... issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, ..."

The question here is:

Can the government, in the absence of fraud or bad faith, "contest" and defeat payment of total permanent disability insurance,

[1] 90 F. (2d) 715, certiorari granted, — U. S. —.

[2] Sec. 307, World War Veterans Act, 1924, as amended July 3, 1930, c. 849, Sec. 24, 46 Stat. 1001.

sold to a World War veteran, on the ground that the veteran was totally and permanently disabled before the policy was reinstated and converted?

First. The government contends that "Congress has not, . . . authorized . . . insurance benefits for total, permanent disability existing prior to any contract of insurance on which the claim is made."

The original War Risk Insurance Act of October 6, 1917,[3] provided.

"That in order to give *every* commissioned *officer* and *enlisted man* and to *every member* of the *Army Nurse Corps* (female) and of the *Navy Nurse Corps* (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents . . . , the United States, upon application to the bureau and *without medical examination, shall grant* insurance against the death or total permanent disability of any such person . . ."

The War Risk Insurance Act must be considered in the light of its passage during war, while men and women were being called into war service. This requires recognition of its generous and liberal purpose to provide "greater protection for (soldiers, sailors and nurses) . . . and their dependents."[4] Its passage indicated Congress conclusively presumed that every person, who had successfully undergone mental and physical examination for war service, was—when inducted into such service—insurable against death and total permanent disability.[5] The Act commanded that insurance against death and total permanent disability be granted, without medical examination, to *every* applicant who had previously been examined and accepted for war service. Congress manifestly intended by these sweeping provisions that policies should be granted without regard to the health of applicants and should be enforceable obligations against the government. Any other construction of this broad, war time legislative grant to soldiers, sailors and nurses would take away the benefits Congress intended them to receive. The provisions of the War Risk Insurance Act are sufficiently comprehensive and inclusive to authorize its administrators to grant insurance covering past or future total

[3] Sec. 400, War Risk Insurance Act of Oct. 6, 1917, c. 105, 40 Stat. 409.
[4] See, United States v. Clarence P. Arzner, 287 U. S. 470, 472.
[5] See, United States v. Domangue, 79 F. (2d) 647, 648.

permanent disability, if such action is found necessary to carry out its far reaching national plan and purposes.

Second. It is contended that the government can contest liability on the ground that the veteran was totally and permanently disabled prior to the reinstatement, despite the provision that such policy "shall be *incontestable* . . . except for fraud, nonpayment of premiums, or on the ground that applicant was not a member of the military or naval forces of the United States, . . ." It is urged that this provision "has no application where, as here, the validity of the policy is not questioned and liability under it is denied solely on the ground that a loss has not occurred during the period of insurance protection." However, it is admitted that this policy did not "expressly exclude total permanent disability *occurring prior to insurance protection, as did the language of the original term contract.*"

This converted policy of insurance provided protection against loss from two causes: namely, death and total permanent disability. A provision making a policy "incontestable" except for certain clearly designated reasons, is wholly meaningless and ineffective if, after proof of the loss insured against, the policy can be contested upon grounds wholly different from those set out in the exception. The object of the provision is to assure the insured that payment on his policy will not be delayed by contests and lawsuits on grounds not saved by the exceptions.[6] Here, it has been established that the veteran is totally and permanently disabled. Yet his policy is contested on the ground that it does not insure against this disability because it existed before the policy was issued. If this defense can be interposed, his policy has never actually protected him against total permanent disability. Since permanent total disability is one of the two risks insured against in the policy, any contest (not based on the exceptions) which may prevent the policy holder's recovery for such admitted total permanent disability—existing while the policy is in force—is a "contest" forbidden by the "incontestable" provision.

No legal obstacle prevents parties, if they so desire, from entering into contracts of insurance to protect against loss that may possibly have already occurred. Marine insurance and ante-dated

[6] Northwestern Life Ins. Co. v. Johnson, 254 U. S. 96, 101, 102.

fire insurance policies frequently afford protection against risks which, unknown to the parties, have already attached.[7]

Even with the benefit of scrupulous good faith, it is not always easy to determine with complete certainty whether or not total permanent disability exists. This uncertainty may lead an insurer, after his own investigation, and for adequate compensation, to treat unknown past and uncertain prospective disability, upon the same basis. This case is an illustration. Here, the government has never admitted that the veteran is totally and permanently disabled. It not only issued him a policy against such disability—with complete knowledge of his then condition—but in this continued contest has denied that the policy-holder was totally and permanently disabled at any time—before, when, or after the policy was issued. There was also a sharp conflict of evidence on this disputed fact.

When a policy of disability insurance is issued after complete examination by the insurer and full and fair disclosure by both parties, there is no legal reason why the insurer cannot contract to afford full protection against loss resulting from past as well as prospective disability. This veteran's policy did not expressly limit liability to *prospective* total permanent disability. The provisions of the policy in this regard contain a promise to pay the veteran "in . . . event of the total, permanent disability . . . (and) Upon due proof of the total permanent disability while this policy is in force, . . ." Original policies issued under the War Risk Act expressly excluded liability for total permanent disability incurred before the policy "was applied for." The deliberate omission, in the converted policies, of this previous exclusion, the language and purport of the original Act and its amendments, the administrative interpretations and legislative history, all throw a flood of light on the intention to include liability for disabilities existing prior to the issuance of the policies.

For more than a decade prior to 1934, (during which period this veteran's policy was purchased), the Bureau, unvaryingly ob-

[7] Gen. Interest Ins. Co. v. Ruggles, 12 Wheat. 408; see, Hooper v. Robinson, 98 U. S. 528, 537; Pendergast v. Globe, etc., Ins. Co., 246 N. Y. 396; Hallock v. Ins. Co., 26 N. J. L. (2 Dutch.) 268; see, Springfield Fire & Marine Ins. Co. v. Nat. Fire Ins. Co., 51 F. (2d) 714, 718-719. A valid aleatory contract may be based on an unknown past event. 3 Williston, On Contracts, (Rev. Ed.), Sec. 888.

serving the statutory mandate, announced and applied the practice that "insurance was incontestable except for the grounds specifically enumerated" in the incontestable provision. A "*subsequent rating* of permanent total disability *effective as of a date prior to the date of reinstatement*", under this consistent administrative interpretation and practice, did "not affect the validity of such reinstatement." Because of court decisions and rulings by the Comptroller General tending to nullify and defeat this administrative practice[8] the Veterans' Administration urged the amendment of July 3, 1930, to confirm its practice and to strengthen and clarify the incontestable provision. For this purpose, the Administrator of Veterans' Affairs testified before the Senate Committee as to the necessity for this amendment:[9]

"This is a very sweeping amendment and will place beyond contest many contracts and policies of insurance which otherwise would be contestable. It is a well recognized principle of commercial insurance companies, however, and *in reality is only a clarification of the existing law which was practically nullified by a recent decision of the Comptroller General.*"

The Solicitor of Veterans' Affairs also testified:

" . . . the present World War Veterans Act of 1924 as amended, contains a provision to the effect that where a policy is maintained in force for a period of six months, it should be incontestable, except for fraud or nonpayment of premiums. *We have followed that, and in all cases where the policy has remained in force for six months* we have paid the claim, irrespective of the merits of it, unless there was fraud or failure to pay premiums. . . . However, under date of January 16, 1930, *notwithstanding the long practice of the bureau*, the Comptroller General, in the case of Mabry W. Woodall, held that if a man *was permanently and totally disabled* at the time he applied for a reinstatement of insurance, or conversion of insurance, . . . *the policy was not incontestable, the statute did not protect it* . . .".

In the *Woodall* case referred to, the Comptroller General had held:

" . . . if the insured *was in fact* dead or *permanently and totally disabled, at the date of application, reinstatement or con-*

[8] 9 Compt. Gen. 291; Jordan v. United States, 36 F. (2d) 43; Golden v. United States, 34 F. (2d) 367.

[9] H. R. 10381, 71st Cong., 2d Sess., Hearings Senate Committee on Finance, pages 90-91.

version, . . . the insurance was subject to subsequent contest. . . . Accordingly, the rule may be stated that *where the Veterans' Bureau has heretofore established or may hereafter establish the condition of permanent total disability at or prior to date of original application for insurance, or application for reinstatement and/or conversion of insurance, . . . the insurance should be considered as invalid . . .*"

The Senate Report on this amendment[10] stated:

"*The purpose is to make all contracts or policies of insurance incontestable from date of issuance, reinstatement, or conversion, for all reasons except fraud, nonpayment of premiums, or that the applicant was not a member of the military or naval forces of the United States. This incontestability would protect contracts . . . where the applicant was not in the required state of health, or was permanently and totally disabled prior to the date of application, . . .* It is appreciated that this is a broad provision, but it was felt that *it was necessary* in order to do justice to the veterans, . . . and *to overcome decisions of the Comptroller General which practically nullified the section as it now exists.*"

The conclusion is inescapable that Congress enacted the 1930 amendment in order to overcome the effect of the above rulings of the courts and the Comptroller General, and with the intention to sustain the Bureau's previous administrative interpretation and practice under the incontestable provision.

To resist payment of this veteran's insurance policy on the ground that he was totally and permanently disabled prior to the issue of the policy, is to "contest" payment within the generally accepted meaning of the word and violates the "incontestable" provision. The purchaser of a policy contract containing a provision that the insurer waives its right to contest except for fraud, nonpayment of premiums, and lack of military or naval service, is entitled to rely on the plain terms and inducements of the provision which limits the grounds for contest of liability to those specifically reserved.[11] The incontestable provision here means that a claim of a veteran whose death or total permanent disability is established shall not be contested except for fraud, nonpayment of premiums or on the ground that the insured had not really been a member of the war forces of the nation or because he was included

[10] Senate Report No. 1128, 71st Cong., 2d Sess., on H. R. 13174.

[11] See, Northwestern Life Ins. Co. v. Johnson, *supra*, at 102.

in Title 38, U. S. C., Sec. 447.[12] Congress evidently believed these exceptions afforded the government ample protection against impositions or unjust claims and intended to limit the right to contest these policies to the specific grounds reserved in the exceptions. The judgment of the Court of Appeals is

Affirmed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[12] 38 U. S. C., Sec. 518, and Sec. 447. This reference to Sec. 447 excluded from the benefits of this incontestable provision any person who had been discharged or dismissed from the service on the ground that he was "guilty of mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct, of which he was found guilty by a court martial, or that he was an alien, conscientious objector who refused to perform military duty or refused to wear the uniform, or a deserter, etc."